



STATE OF WASHINGTON
WASHINGTON STATE BOARD OF HEALTH
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September 11, 2002

To: Washington State Board of Health Members
From: Tom Locke, Board Member
Re: CR-102 HEARING, DRAFT RULE ON EMERGENCY POWERS

Background and Summary

In November 2001, the Board adopted *Response Capacity During a Public Health Emergency—A Review of Selected Issues*. The report included among its recommendations: “The Board should initiate a review, in partnership with Department of Health, local health jurisdictions, and other affected parties, of the adequacy of current Board rules concerning reporting of notifiable conditions, isolation and quarantine, and the emergency powers of local health officers.”

After adopting the report, the Board issued a CR-101 (WSR 01-24-102) and I, along with Board staff, began the review called for in the report. The initial product of that review is draft rule scheduled for public hearing today. The rule was published August 21, 2002 as a CR-102 (WSR 02-16-102).

The rule would establish modern due process procedures to be followed if mandatory isolation and quarantine become necessary during a health emergency. It would also iterate, and to a degree strengthen, requirements that the orders of a local health officer be enforced by police agencies and obeyed by the public.

Recommended Board Action

None at this time. The Board may wish to prepare another draft based on today’s testimony and other last-minute comments, republish if the changes are significant, and schedule another hearing and possible adoption.

Discussion

Protecting the public health is recognized as one of the fundamental duties of local governments, and Washington law grants broad authority to local boards of health (RCW 70.05.060) and local health officers (RCW 70.05.070) to institute emergency control measures. It also requires that the public comply with the orders of boards of health and local health officers (RCW 70.05.120), and that law enforcement officers enforce all State Board of Health rules (RCW 43.20.050). The courts have repeatedly held that these public health statutes should be interpreted broadly.

In March, the Board convened a work group to discuss any gaps in existing statutes and administrative laws that might impair local response to a public health emergency, including a bioterrorism event or a major communicable disease outbreak. Participants included representatives from law enforcement, professional associations, local public health, state public health, prosecuting attorneys, and the Attorney General's Office.

The two issues that emerged from that meeting as the areas of greatest and most immediate concern were the absence of clear procedures for isolation and quarantine and the need to ensure that law enforcement will enforce the orders of health officers. This finding was consistent with testimony before SBOH, critiques of state public health law in national law journals, the lessons learned from emergency planning exercises, and research by assistant attorneys general for the Board and the Department of Health. Other issues also came up at that meeting, but we decided to move ahead expeditiously on the first two concerns, which clearly could be addressed in rule by the Board, while continuing to discuss how best to address other issues.

RCW 43.20.050(2)(d) gives the Board specific statutory authority and responsibility to "[a]dopt rules for the imposition and use of isolation and quarantine." State statutes and Board rules contain rules for involuntary detention (e.g., mandatory isolation or involuntary commitment) for specific conditions and health-related situations, including HIV/AIDS, tuberculosis, sexually transmitted diseases, mental illness, substance abuse, and child abuse. All of these lay out procedures to be followed to protect due process. There are, however, no statutes or rules in Washington that establish procedures for isolation and quarantine and are not condition-specific.

Before you today is a proposed draft of possible revisions to State Board of Health rules governing communicable disease reporting, disease and contamination control measures, and the emergency powers of local health officers. A discussion draft circulated widely for review and comment during July. The published version being heard today reflects comments received prior to the deadline for submitting a draft to the Official Typing Service. Comments received subsequently were not addressed in this draft but could be addressed in a subsequent draft.

The rule changes would not create any new powers—rather, they are meant to: modernize existing law to protect civil liberties during periods of isolation and quarantine; and consolidate in rule statutory requirements that law enforcement agencies enforce, and members of the public comply with, the orders of a local health officer and the rules of a state or local board of health.

In brief, the rule changes postulated in this discussion draft would:

- Add new sections to chapter 246-100 WAC, Communicable and Certain Other Diseases to establish due process procedures for isolation and quarantine.
- Add a new section to chapter 246-100 WAC referencing existing statutory legal authority and requirements to enforce the orders of a local health officer.
- Edit existing sections of chapter 246-100 WAC and chapter 246-101 WAC, Notifiable Conditions to remove specific mention of instituting isolation, quarantine, and other disease control measure, and replacing them with a reference the provision of the new sections in chapter 246-100 WAC.
- Additions and revisions to the definitions section of chapter 246-100 WAC to support the new provisions.

The changes would establish:

- Conditions that must be met before detaining people involuntarily,
- A right to notice,
- How long a person or group can be isolated or quarantined on the order of a local health officer before judicial review is necessary,
- The standard of proof for convincing the court to issue, uphold, or extend an isolation or quarantine order,
- Conditions of quarantine,
- Conditions for entering an isolation and quarantine facility,
- Right to counsel,
- Procedures for seeking relief from the courts, and
- Other due process protections.

The rule references in one place in the new rule the existing statutes governing enforcement of health officer orders. The fact that there will be a specific State Board of Health rule governing isolation and quarantine also strengthens the enforceability of a health officer's isolation and quarantine order, because it makes RCW 43.20.050 applicable. The statute requires law enforcement agencies and other city and county officials to enforce all Board rules. If there is a specific rule for isolation and quarantine and local health officer issues an order in compliance with the rule, then the Board's statutory authority means police and sheriffs must enforce that order.

In drafting the new material, the Board borrowed heavily from existing Board rules and state statutes governing involuntary detention and due process. It also borrowed from the disease control and bioterrorism statutes in other states, and from the Dec. 21, 2000 draft of the Model Emergency Health Powers Act.

Several attachments are included with this packet. Attachment A is the CR-102 including the proposed rule. Attachment B is a brief summary and flow chart of how the draft procedures are intended to work should isolation or quarantine become necessary. Attachment C is the explanation of how and why we determined that it was not necessary to complete a Small Business Economic Impact Statement for this rule. Attachment D is the Legislatively Significant Rule Analysis required by the Administrative Procedures Act. Attachment E is a summary of some additional issues related to public health authority in the event of a health emergency that have been mentioned as areas of concern but, for a variety of reasons, are not addressed in this discussion draft. This last document was circulated with the discussion draft in July.

I am not recommending action at this time because there are ways the proposed rule could be improved. I also believe the significance of this rule justifies more than one hearing. I am recommending that the Board consider written comments received after this rule went to press and the testimony it hears today, prepare another draft, republish in October if necessary, and hold a second hearing on the later draft—possibly in October or in December if republication is necessary. The Board may wish to adopt the rule at that time.

Attachments